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FAX COVER SHEET

To: Idaho Department of Water Resources -Southern Region
Fax No.: 208-736-3037
From: Robert E. Williams
Subject: Final Argument - Application for Transfer No. 71692
David and Shirlene Funk
Date: February 14, 2006

Attached please find the Final Argument regarding the above referenced matter. If there are any questions, please call Mr. Williams at this office.

Thank you,

Cathy Harding
for R. Williams

No. of Pages Transmitted: _____, including cover page

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ATTORNEYS FOR APPLICANTS DAVID AND SHIRLENE FUNK

BEFORE THE DEPARTMENT OF WATER RESOURCES
 OF THE
 STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR TRANSFER NO. 71692 David & Shirlene Funk, Applicants Farnum Warr, Kenneth Warr, Kenneth Skow, Marjorie L. Bradshaw, John Kloer, Thomas C. Draper, Protestants.	FINAL ARGUMENT OF DAVID AND SHIRLENE FUNK SOURCES: Ground water, Wastewater COUNTY: Cassia
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The Applicants, David and Shirlene Funk, through their attorney, Robert E. Williams of Fredericksen, Williams, Meservy & Lothspeich, LLP, hereby submit their final argument in the above referenced matter.

I.

Procedural Background

On May 26, 2005, the Applicants filed their corrected Application for Transfer under Transfer No. 71692. The transfer, involving current water rights numbers 45-2472 and 45-2399,

seeks to change the nature of use for the existing irrigation water rights to stock water/commercial in connection with the Applicants' proposed new dairy operation in Cassia County. In addition to changing the nature of the use of the water, the application seeks to add additional points of diversion and to modify the period of use from seasonal irrigation to year round use.

After the Notice of Pending Application for Transfer was properly published in the South Idaho Press, protests were filed timely by Farnum Warr, Kenneth Warr, Kenneth Skow, Marjorie L. Bradshaw, John Kloer, and Thomas C. Draper. Although the grounds for protests were not entirely clear on the face of each Notice of Protest, the Protestants' concerns were mainly that the proposed transfer would injure water rights, would enlarge existing water rights, or that it conflicted with the local public interest.

Pursuant to notice, a Pre-Hearing Conference was held at the Department of Water Resources' regional office in Twin Falls, Idaho on Wednesday, September 14, 2005. Following the pre-hearing conference, a formal hearing on the transfer application was held on Tuesday January 24, 2006 commencing at 9:00 a.m. in the Obenchain Insurance Building, Twin Falls, Idaho. Protestants, Kenneth Warr, Thomas C. Draper, and Kenneth Skow appeared at the hearing and participated. No other Protestants appeared or participated. The Applicants, through their attorney, Robert E. Williams of Fredericksen, Williams, Meservy & Lothspeich, LLP also appeared and participated. Witnesses were called and testimony was received on behalf of the Applicants. Applicants exhibits were offered and received into evidence. Some exhibits offered by Protestants were received into evidence. The Hearing Officer took under advisement the admissibility of certain of the exhibits offered by the Protestants, reserving his ruling as to their relevancy after a review of the offered exhibits. Following the conclusion of the hearing, the Hearing Officer gave the parties until February 7, 2006 to submit final written arguments. The date for submitting final written arguments was extended to February 14, 2006 by stipulation of the parties because of the death of Protestant Farnum Warr.

II

Standards for Approval

Idaho Code 42-222, in pertinent part, provides that with respect to Applications for Transfer filed before the Department of Water Resources that: "The Director of the Department of Water Resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided that no other water rights are injured thereby, the change does not constitute an enlargement in use of the original right, the change is consistent with the conservation of Water Resources within the State of Idaho and is in the local public interest as defined in Section 42-202(b), Idaho Code, the change will not adversely affect the local economy of the water shed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside the water shed or local area where the source of water originates, and the new use is a beneficial use... The director may consider consumptive use as defined in Section 42-202(b) Idaho Code as a factor in determining whether a proposed change would constitute an enlargement in the use of the original water right. The director shall not approve a change in the nature of use from agricultural use where such change would significantly affect the agriculture base of the local area..." Idaho Code 42-202(b)(3) defines "Local public interest" as "the interest that the people in the area directly affected by a proposed water use have on the effects of such use on the public water resource." Idaho Code 42-202(b)(1) provides in pertinent part, that: "'Consumptive use' means that the annual volume of water diverted under a water right that is transpired by growing vegetation, evaporated from soils, converted to non recoverable water vapor, incorporated into products or otherwise is not returned to the waters of the State. Consumptive use is not an element of a water right. Consumptive use does not include any water that falls as precipitation directly on the place of use. Precipitation shall not be considered to reduce the consumptive use of a water right. 'Authorized consumptive use' means the maximum consumptive use that may be made of a water right. If the use of the water right is for irrigation, for example, the authorized consumptive use reflects irrigation of the most consumptive vegetation that may be grown at the place of use..."

III

Argument

The Applicant has clearly met its burden of proof under the standards promulgated by Idaho Code 42-222 and the application for transfer should be approved as submitted.

A.

Injury to Other Water Rights

The Applicants submitted a well interference study prepared by Dr. Charles G. Brockway, an expert witness for the Applicant. The study demonstrated that the proposed dairy wells, when pumping either at an average rate to produce the desired volume of 138 acre feet over an entire year, or being pumped at the maximum permissible rate for a period of fourteen days, would have only insignificant impacts on the wells of the Protestants. The impacts over the time spans involved in each of the scenarios, resulted in a predicted draw down of between a quarter of an inch to less than 8/100 of an inch at the Protestants' wells. The well interference study, which was not countered by any expert or scientific data from the Protestants, establishes that none of the Protestants' water rights, or any water right at all, would be injured quantitatively, as a result of the transfer.

The evidence also demonstrated that there would be no qualitative injury to either the surface waters or ground waters of the State of Idaho as a result of the transfer application being approved. David Funk acknowledged existing laws of the State of Idaho that require his dairy operation to confine polluted water to the boundaries of his facility, and that the facility was designed to meet the standard. Mr. Funk testified that berming would be constructed to prevent the escape of any water containing manure from his premises into adjacent canals, or from his property boundaries at all. Mr. Funk acknowledged his duty to comply with an approved nutrient management plan by the Idaho Department of Agriculture before being able to commence his new dairy operations. The evidence was uncontradicted that nutrient management planning is designed to require CAFO operators, such as Mr. Funk, to land apply liquid and solid waste in such a fashion that it would not exceed the ability of the crops on the land to uptake the nutrients from the waste, this protecting the ground

water of this state.

Robert Ohlenschlen, former University of Idaho extension professor, testified that the lagoon to be constructed by Mr. Funk has been designed to meet existing standards administered by the Idaho Department of Agriculture preventing lagoon leakage to the aquifer. Mr. Ohlenschlen also cited Idaho studies that have not found nitrates to have leaked from Idaho dairy lagoons that were not constructed with clay liners as now required, and that the liners add additional protection. He also testified that the Idaho Dairy Pollution Initiative, entered into by the Idaho Dairyman's Association, the Idaho Department of Agriculture, the Idaho Department of Environmental Quality and the United States Environmental Protection Agency has shown to be an exemplary model to the nation for achieving compliance in preventing dairy wastes from entering public waters. Further, the multi-agency site committee team report admitted as Protestants' Exhibit "AF" contains an assessment of the predicted environmental risk at the new dairy site. The siting team, composed of experts from the Idaho Departments of Water Resources, Environmental Quality and Agriculture, assigned the site as "low risk", the lowest possible classification for environmental risk that the team can make. The available well quality data in the area shows nitrate levels to be stable or declining. With the correction made to the purported reading of 13.4 parts per million of nitrate at the well in Township 11 South, Range 21 East, Section 10 to 6.9 parts per million, the stability of nitrates in the area ground water is confirmed. Applicants' demonstration that they will comply with all current requirements of law as administered by other governmental agencies concerning land application of the nutrients generated from the facility leads to the inexorable conclusion that this application does not pose any reasonable danger to the quality of the ground or surface water of this state.

As stated in *Shokal v. Dunn*, 109 Idaho 330, 707 P2d 441, 451, 452 "... (The Department of) water resources must oversee the water resources of the State, insuring that those who have permits and licenses to appropriate water use the water in accordance with the conditions, of the permits and licenses in the limits of the law. It is not the primary job of Water Resources to protect the Health and Welfare of Idaho's citizens and visitors— that role is vested in the Department of Health and Welfare, including compliance with the water quality regulations and monitoring of fluent discharge in our state's waterways..." (emphasis added) which was much more broad than the current

definition. It should be born in mind that *Skokal supra*, was decided under the former statute's definition of the "local public interest." The new definition is now confined to the affairs of the local public interest with respect to the use of the water resource itself. Here, there is no evidence that the Applicants will not fully comply with and meet the existing standards for the protection of the ground and surface waters of this state and feel they do, or will, fully comply unto the water quality regulations imposed by current law. This application is fully consistent with the doctrine of *Shokal, supra*.

B.

Enlargement and Conservation

The Protestants also believe the Applicants' transfer will cause an enlargement of the two existing water rights involved in the transfer. The Applicants produced a water balance study authored by their expert witness, Dr. Charles G. Brockway. The water balance study establishes that the aquifer will benefit by 19.6 acre feet per year as a result of the transfer. The consumptive use of the water does not increase as a result of the transfer because of the withdrawal of irrigation water from the property it presently irrigates, thereby "drying up" that acreage.

The Applicants' expert also testified that because of the short distance between the current point of diversion and the new proposed points of diversion that both the old and new transfer fool models predicted less than a 5% impact on reaches of the Snake River as a result of the transfer, requiring no mitigation to avoid an enlargement under current rules of the department. The Protestants offered no evidence to rebut or refute the water balance and enlargement analysis offered and received into evidence by the Applicants.

David Funk also testified concerning the redundant use of the same water through several systems of his dairy operation, thus, helping to minimize the amount of water to be used. This evidence, together with the evidence previously identified that the aquifer would be approximately 20 acre feet better off per year, is consistent with reasonable water conservation standards for the State of Idaho.

C.

Local Public Interest: Effect on Agricultural Base

The issues under the local public interest contested by the Protestants, are the identical issues discussed previously for the injury and enlargement headings. Also, the evidence produced by the Applicants demonstrated the non-existence of negative impacts on the public water resource as a result of the transfer. Applicants produced evidence that the new dairy facility would be fully consistent with the character of the surrounding area and would further strengthen the local agricultural economy by providing new jobs and opportunities for other farmers to sell feed commodities to the new dairy operation. There is no evidence that the proposed transfer will do anything but enhance the agriculture economy of the local area.

D.

Protestants' Evidence

The Protestants' evidence consisted entirely of reports and collections of data that to some degree have measured the presence of nitrates in ground water of certain regions of Idaho. None of Protestants' exhibits contain evidence that refutes the Applicants' case that the transfer would work no qualitative or qualitative injury to the public water resource. None of the exhibits discuss the impacts of this specific transfer. None of the exhibits discuss the effectiveness of the nutrient management planning, berm constructing, and other regulatory compliance measures to be undertaken by the Applicant. Protestants' exhibits are designed to encourage the Hearing Officer to speculate that the governmental agencies who administer the existing programs designed to protect the public water supply have not done a proper job or will not do it in the future. There is no legal precedent that this is the proper role of the Department of Water Resources. The type of regulation that the new use of water proposed by the transfer must abide are laudible means of preventing contamination of the public water resource. The Applicants have shown the public is much better protected by the comprehensive regulation of nutrient ridden waters associated with dairy operations than it is from presently unregulated other sources

of nutrient pollution such as commercial fertilizer or human activity.

Conclusion

The IDWR staff report in the water transfer file sees no impediment to the approval of this transfer application. The evidence now in the record overwhelming reports the staffs' initial view. All aspects of the standards of Idaho Code 42-222 that must be met for approval, of this transfer application are supported by substantial, un rebutted evidence in the record. The application should be approved.

Respectfully Submitted this 14th day of February, 2006.

FREDERICKSEN, WILLIAMS, MESERVY & LOTHSPICH, LLP



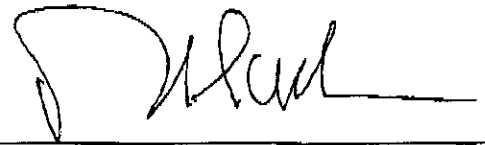
ROBERT E. WILLIAMS

Attorney for Applicants, David & Shirlene Funk

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 14th day of February, 2006, I served a true and correct copy of the foregoing document on the person(s) whose names and addresses appear below by the method indicated:

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